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CURRENT TOPICS.

The following is the syllabus of a very important case recently decided by the Supreme Court of Kansas. (Hardy v. Atchison, etc., Co.):

1. Under Art. 1, Sec. 8 of the Constitution of the United States, the power of Congress to regulate commerce among the States—inter-state commerce—which consist among other things, in the transportation of goods from one state to another, is exclusive.

2. The fact that Congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one state to a place in another—inter-state commerce—does not empower the states of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that inter-state commerce shall be free and untrammeled. Keiser v. Ill. Cent. R. Co, 16, Am. & Eng. R. Cases, 40; Louisville & N. R. Co. v. R. Com. of Tenn., 16 Am. & Eng. R. Cases, 1; Carton v. Ill. Cent. R. Co. 39 Ia. 148—6 Am. & Eng. R. Cases, 305 and the authorities there cited; Crandall v. State of Nevada, 6 Wall. 35; State Freight Tax, 82 U. S. 232; Welton v. State of Missouri, 91 U. S. 275; R. Co. Husen, 95 U. S. 465; Hall v. DeCuir, 95 U. S. 485; Telegraph Co. v. Texas, 105 U. S. 460; Steamship Co. v. Board of R. Com. 18 Fed. Rep. 10; Pullman Southern Car Co. v. Nolan, C. L. J. Vol. 19, 369; Gibbens v. Ogden, 9 Wheat. 1; The Daniel Ball,10 Wall. 565; City of Council Bluffs v. R. Co., 45 Ia. 338; Passenger Cases, 7 How. 283; State of Pa. v. Wheeling Bridge Co. 18 How. 481; Cooley v. Board of Wardens, 12 How. 299; Coleman v. Philadelphia, 7 Wall. 713; State v. Saunders, 19 Kas. 127.

3. Query: Has not Congress legislated upon inter-state commerce by the act of June 15, 1866, authorizing all railroad companies to transport passengers and freight from State to State and empowering them to receive and accept compensation therefor? (Rev. Stats. U. S. 1879, Sec. 5258).

4. Sec. 57, Chap. 23, Comp. Laws of 1879,—know as the Maximum Freight Rate Law of 1868—had no application to fix or limit the charges for transportation of freight from another state into this state, because if it was intended to apply to such inter-state commerce, it was in violation of Art. 1, Sec. 8 of the Constitution of the United State and therefore void.

Whether one can be guilty of manslaughter unless the death of the party who lost his life was the consequence of some unlawful act, has been a mooted question, but has been answered in the affirmative by the Supreme Judicial Court of Massachusetts in Commonwealth v. Pierce. The defendant had caused a woman's death by neglect in furnishing a prescription, *i. e.*, covering her with flannels saturated with kerosene. The court below ruled that:

"It is not necessary to show an evil intent; if, by gross and reckless negligence the defendant caused the death, he is guilty of culpable homicide. The question is, whether the kerosene, if it was the cause of the death, either in its original application, renewal or continuance, was applied as the result of foolhardy presumption or gross negligence by the defendant. A man is not to be convicted of manslaughter merely because of his ignorance. His ignorance is only important as bearing upon the question whether his conduct in the care and treatment of the patient was marked by foolhardy presumption or gross and reckless carelessness. The defendant in this case is to be tried by no other standard of skill or learning than that which he necessarily assumed in treating the deceased; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it. The government must show not merely the absence of ordinary care, but gross [carelessness amounting to recklessness."

Holmes, J., speaking for the court, in affirming the action of the Superior Court, says:

"The defendant's duty was not enhanced by any expressed or implied contract; but he was bound at his peril to do no grossly reckless act when he intermeddled with the person of another in the absence of any emergency or other exceptional circumstances. The defendant relies on the case of the Commonwealth v. Thompson, 6 Mass. 134, and that to constitute manslaughter the killing must have been a consequence of some unlawful act. If this means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong.

Such may once have been the law; but for a long time it has been just as fully and latterly we may add, much more willingly recognized that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful, from which death accidentally ensues. But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of overt acts.

There is no denying that Commonwealth v. Thompson, although possibly distinguishable from the present case on the evidence, tends very strongly to limit criminal liability for reckless conduct, to cases where the recklessness is moral, in the sense above explained. But it is to be observed that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord Hale, 1 P. C. 4-29, and we think that they fall into the mistake of taking him too literally. Lord Hale admitted that other persons might make themselves liable by reckless conduct. We doubt if he meant to deny if a physician may do so as well as any one else. He has not been so understood in later times.

In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is equivalent with an inquiry into the degree of danger attaching to the act of common experience, under the circumstances known to his action. It is here implied, and is undoubtedly true as a general proposition, that a man's liability for his acts is determined by their tendency under the

circumstances known to him, and not by their tendency under all the circumstances actually affecting the result whether known or unknown. Another can not escape on the ground that he has had less than a common experience. Common experience is necessary to a man of ordinary prudence, and a man assume to act as the defendant did must have it at his peril. Here the defendant knew he was using kerosene More than that, he saw from day to day how it worked. The jury found that it was applied as the foolhardy presumption or gross negligence, and that is enough. When the defendant applied the kerosene to the person deceased, in a way in which the jury have found to have been reckless, or in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify, by her consent, and which, therefore, was an assault notwithstanding that consent.

The allegation that the kerosene was of a dangerous tendency, although often inserted in the indictment, is superfluous, it being enough to allege that death did in fact result from the assault; it would be superfluous in the case of an assault with a stick, or when the death resulted from assault combined with exposure.

IMPLIED PROMISES.

Sec. 1. *Three General Propositions Stated.*—The following propositions are often met with in the books, either stated in terms or assumed as the basis of decision:

1. That a promise will not be implied contrary to the real understanding of the parties.[1]

2. That a moral obligation will not support an implied promise,[2] and perhaps not an express promise.[3]

3. That a request is necessary to raise an implied promise.[4]

It is proposed to consider what these propositions mean and how far they are true.

Sec. 2. *Proposition* 1: *That a contract will not be implied contrary to the real understanding of the parties.*—I shall show: 1. That this proprosition however understood, is not universally true. 2. That it is not true in any case in the full sense which the words in which it is couched import. 1. Whether this proposition is understood in a strict sense according to the import of the words in which it is couched, or in the loose sense which I shall hereafter point out, it is not universally true. Two exceptions cut in upon it so extensively as almost to destroy its character as a rule. The first exception is, that it does not apply where the act out of which the promise is implied is in itself a tort. The second is, that it

[1] Page v. Marsh, 36 N. H. 305; Maltby v. Harwood, 12 Barb. 473; Harney v. Owen, 4 Blackf. 337; Fitch v. Peckham, 16 Vt. 150: Griffin v. Potter, 14 Wend. 209; Livingston v. Ackeston, 5 Cow. 531; Urie v. Johnston, 3 Pa. (Penr. & W.) 212; Alfred v. Fitzjames, 3 Esp. 3; Williams v. Hutchinson, 3 N. Y. 312; Williams v. Finch, 2 Barb. 208; Olney v. Myers, 3 Ill. 311; Robinson v. Cushman, 2 Denio. 149; Guild v. Guild, 15 Pick. 129; Andrews v. Foster, 17 Vt. 556; Swires v. Parsons, 5 Watts. & S. 357; Guenther v. Birkicht, 22 Mo. 439; Gillett v. Camp, 27 Mo. 541; Coleman v. Roberts, 1 Mo. 97; Morris v. Barnes, 35 Mo. 412.

[2] Atkins v. Banwell, 2 East. 505; Edwards v. Davis, 16 Johns. 281; Bartholomew v. Jackson, 20 Johns. 28; Dunbar v. Williams, 10 Johns. 249; Rensselaer Glass Factory v. Reed, 5 Cow. 587, 602, per Colden, Senator; Ibid. 620, per Spencer, Senator; Wennall v. Adney, 3 Bos. & P. 247; Newby v. Wiltshire, 2 Esp. 739; Brooks v. Read, 13 Johns. 380; Everts v. Adams, 12 Johns. 351; Mumford v. Brown, 6 Cow. 475; Doane v. Badger, 12 Mass. 65; Loring v. Bacon, 4 Mass. 575; Frear v. Hardenburg, 5 Johns. 272.

[3] It should seem that upon a question so elementary and so necessary to be understood by all men, the law ought to be well settled; but there is an irreconcilable conflict of opinion among the highest courts and the ablest judges, whether a moral or a conscientious obligation is of itself a sufficient consideration to support an express promise. In favor of the proposition that it is, we find the distinct opinions of Lord Mansfield (Lee v. Muggeridge, 5 Taunt. 36, 46,) Lord Ellenborough (Atkins v. Banwell, 2 East, 505,) and Chief Justice Kent. Stewart v. Eden, 2 Caines, 150. These opinions are supported by considerable *dicta* and perhaps by some express decisions. Atkins v. Hill, Cowp. 288; Hawkes v. Saunders, Id. 290; Trueman v. Fenton, Id. 544; Scott v. —— Esp. N. P. 945; Watson v. Turner, Bull. N. P. 147; Doty v. Wilson, 14 Johns. 378; McMorris v. Herndon, 2 Bailey Law, 56; s. c. 21 Am. Dec. 515; Cardwell v. Strother, Lit. Sel. Cas. 429; 12 Am. Dec. 326. Contrary conclusions are to be drawn from the following cases: Bret v. J. S., Cro. Eliz. 755; Harford v. Gardener, 2 Leon. 30; Ehle v. Judson, 24 Wend. 97; Smith v. Ware, 13 Johns. 257; Hunt v. Bate, Dyer 272; Frear v. Hardenburg, 5 Johns. 272; Barnes v. Hedley, 2 Taunt. 184; Thorne v. Dias, 4 Johns. 84; Kelbourn v. Bradley, 3 Day, 356; s. c. 3 Am. Dec. 237; Cook v. Bradley, 7 Conn. 57; s. c. 18 Am. Dec. 79; Nixon v. Vanhise, 2 South. (N. J.) 491; s. c. 8 Am. Dec. 618; Greenbaum v. Elliott, 60 Mo. 25. The inquirer who curiously pursues the subject will find it either elucidated or confounded by a comparison of the following decisions: Bessich v. Coggil, Palmer 559; Butcher v. Andrews, Carthew, 446; Church v. Church, cited in Sir T. Raym. 260; Hayes v. Warren, 2 Strange, 933; Style v. Smith, cited in 2 Leon. 111; Barber v. Fox, 2 Saund. 136; Hunt v. Swain, 1 Lev. 165; s. c. Sir T. Raym. 127; 1 Sid. 248; Lloyd v. Lee, 1 Strange, 94; Cockshott v. Bennett, 2 T. R. 763.

[4] *Infra* Sec. 4; Schmidt v. Smith, 57 Mo. 135; Price v. St. Louis Life Insurance Co., 3 Mo. App. 262; Sloan v. St. Louis, etc., R. Co., 58 Mo. 220.

does not apply in the case of building contracts. The first of these exceptions introduces the well-known principle that where A. unjustly, by force or by fraud,[5] gets from B. that which belongs to B., B. may either sue A for the tort and recover the damages which he may have suffered, including special or consequential damages where such damages are pleaded and proved, and, in aggravated cases, exemplary damages given by way of punishment and example; or he may waive the tort and recover, as upon a contract, in some cases, the money which A. has received for the thing taken, and in other cases its reasonable value. Thus, if a man wrongfully takes my goods and chattels and converts them into money, albeit through a larceny,[6] I can waive the tort, sue him on an implied promise and recover the money.[7] A man forcibly abducts, or entices away, or knowingly harbors and conceals my child (the same being my servant) or my apprentice; I can maintain an action for the tort[8] and recover, not only direct compensatory damages, but also indirect or consequential damages where the same are laid and proved,[9] and also exemplary damages given as a punishment and for mental suffering;[10] or he may waive the tort and sue as upon a contract for the value of the services of the child or apprentice while so kept away.[11] In all these cases the law raises the implication of a contract, although no contract was intended by either party. It raises it on the principle of an estoppel. It allows the plaintiff to assert it and prohibits the defendant from denying it, although it is not true. It will not permit the defendant to deny it, because it will not permit him to avoid a right of action founded in plain justice by proving his own wrong.[12] The second exception, that which arises in the case of building contracts, is equally marked. A. contracts with B. to build a house upon the land of the latter, according to certain plans and specifications. A., endeavoring in good faith to complete the contract, fails to complete it, or fails to complete it according to

[5] Magoffin v. Muldrow, 12 Mo. 512; Walker v. Davis, 1 Gray, 506; Boston R. Co. v. Dana, 1 Gray, 83; Howe v. Clancey, 53 Me. 130.

[6] Howe v. Clancey, 53 Me. 130; Boston R. Co. v. Dana, 1 Gray, 83.

[7] Hambley v. Trott, Cowp, 373; Gilmore v. Wilbur, 12 Pick. 129; s. c. 22 Am. Dec. 410; Cummings v. Noyes, 70 Mass. 433; Glass Co. v. Walcott, 2 Allen, 227; Boston, etc., R. Co. v. Dana, 1 Gray, 83; Mann v. Locke, 12 N. H. 246; White v. Brooks, 43 N. H. 402; Smith v. Smith, Id. 536; Balch v. Patten, 45 Me. 41; Shaw v. Coffin, 58 Id. 254; Howe v. Clancey, 53 Id. 130; Lord v. French, 61 Id. 420; Rand v. Nesmith, Id. 111; Pearsoll v. Chapin, 44 Pa. St. 9; Goodenow v. Snyder 3 Greene (Ia.) 599; Moses v. Arnold, 43 Ia. 187; Fratt v. Clark, 12 Cal. 89; Halleck v. Mixer, 29 Id. 574; Crow v. Boyd, 17 Ala. 51; Pike v. Bright, 21 Id. 332; Staat v. Evans, 35 Ill. 455; Centre Turnpike Co. v. Smith. 12 Vt. 212; Stearns v. Dillingham, 22 Vt. 624; Randolph Iron Co. v. Elliott, 37 N. J. L. 184; Budd v. Hiler, 27 Id. 43; Hutton v. Wetherald, 5 Harr. (Del.) 38; Watson v. Stever, 25 Mich. 386; Norden v. Jones, 33 Wis. 600; Stockett v. Watkins, 2 Gill. & J. 326; s. c. 20 Am. Dec. 428. The doctrine seems to be in great confusion, as will appedr by a learned note of Mr. Freeman in 31 Am. Dec. 242, *et seq.* The incongruity of the common law is such that if a man tortiously gets possession of my house, and holds it adversely to me, I can not waive the tort and recover on an implied promise for use and occupation. Lloyd v. Hough, 1 How. U. S. 160; Stockett v. Watkins, 2 Gill. & J. 326; s. c. 20 Am. Dec. 438; Smith v. Stewart, 6 Johns. 46; s. c. 5 Am. Dec. 186; Fitzgerald v. Beebe, 7 Ark. 305; s. c. 46 Am. Dec. 285; Henwood v. Cheeseman, 3 Serg. & R. 500; Hayes v. Acre, Cam. & M. 19. Stuart v. Fitch, 2 Vroom, 17; Hall v. Southmayd, 15 Barb. 32; Moore v. Harvey, 50 Vt. 297; Osgood v. Dewey, 13 Johns. 240; Gunn v. Scovil, 4 Day, 228; Stockett v. Watkins, 2 Gill. & J. 326; Couch v. Briles, 7 J. J. Marsh. 257; Estep v. Estep, 28 Ind. 114; Nance v. Alexander, 48 Id 516; Dalton v. Landahn, 30 Mich. 349; Edmondson v. Kite, 43 Mo. 176; Sylvester v. Rawlston. 31 Barb. 286; Newby v. Vestal, 6 Ind. 412; Redden v. Barker, 4 Harr. 179; Williams v. Hollis, 19 Ga. 313; Dudding v. Hill, 15 Ill. 61; McNair v. Schwartz, 14 Id. 24; Dixon v. Haley, Id. 145; Boston v. Binney, 11 Pick. 1; Scales v. Anderson, 26 Miss. 94; Cohen v. Kyler, 27 Mo. 122; Brewer v. Craig, 18 N. J. L. 214; Stewart v. Fitch, 31 Id. 17; Hurd v. Miller, 2 Hilt. 549; Campbell v. Renwick, 2 Bradf. 83; Colt v. Planer, 4 Abb. Pr. (N. S.) 140; LaForge v. Park, 1 Edm. Sel. as. 223; Pierce v. Pierce, 25 Barb. 243; Espy v. Fenton, 5 Ore. 423; Langford v. Green, 52 Ala. 103; Folsom v. Carli, 6 Minn. 420; Ryan v. Marsh, 2 Nott. & M. 156; Wiggins v. Wiggins, 6 N. H. 298; Richey v. Hinde, 6 Ohio 371; Howe v. Russell, 41 Me. 443; Sampson v. Shaeffer, 3 Cal. 196; O'Conner v. Corbitt, Id. 370; Cincinnati v. Walls, 1 Ohio St. 222; Wharton v. Fitz Gerald, 3 Dall. 503; Byrd v. Chase, 10 Ark. 602; Eastman v. Haward, 30 Me. 58; Curtis v. Treat, 21 Id. 525; Croswell v. Crane, 7 Barb. 191; Watson v. Brainard, 33 Vt. 88; Ramirez v. Murrey, 5 Cal. 222.

[8] Gilbert v. Schwenck, 14 Mees. & W. 488; Magee v. Holland, 27 N. J. L. 86; Plummer v. Webb, 4 Mason, 380; Steele v. Thatcher, 1 Ware, 91; Evans v. Walton, L. R. 2 C. P. 615; s. c. 36 L. J. (C. P.) 307; Stowe v. Haywood, 7 Allen. 118; Wood v. Coggeshall, 2 Met. (Mass.) 89; Caughey v. Smith, 47 N. Y. 244; Blake v. Lanyon, 6 T. R. 221; Sykes v. Dixon, 9 Ad. & El. 693; Pelkington v. Scott, 15 Mees. & W. 657; Hartley v. Cummings, 5 C. B. 248.

[9] Gunter v. Astor, 4 J. B. Moore, 12; Flemington v. Smithers, 2 Car. & P. 292; Wilt v. Vickers, 8 Watts, 227; Magee v. Holland, 27 N. J. L. 86.

[10] Magee v. Holland, 27 N. J. L. 88; Stowe v. Haywood, 7 Allen. 118.

[11] Lightly v. Clauston, 1 Taunt. 112.

[12] Lightly v. Clauston, 1 Taunt. 112.

the specifications, or fails to complete it within the time agreed upon. Nevertheless, as B. has received benefit from the labor and materials of A., the law implies a new promise on his part to pay to A. what they are reasonably worth,[13] less the damage which B. may have sustained through the breach of the express contract which subsisted between the parties;[14] which contract, breach, and consequent damages, may be pleaded by B. as a counter-claim to the action of A.[15] This principle is extended in some jurisdictions to contracts to perform labor or furnish materials other than building contracts,[16] and in some jurisdictions it is denied as to building contracts.[17] It is perceived, that where the rule as to building contracts prevails, it results in this: That the law allows a party to recover upon an implied promise which did not exist in fact, and which is distinctly variant from the terms of a written contract which did exist.

Having thus shown that the proposition that a contract can not be implied contrary to the real understanding of the parties is not universally true, I shall next show that the proposition is not true in any case in the full sense which the words in which it is couched import. Indeed, this must be apparent from what has just been said with regard to building contracts. Here the parties have entered into a contract in which everything which is to be done is specified with minute detail. There is no defect in the real understanding of the parties. The contract is not performed as made, and yet a recovery is allowed for a partial performance. But it does not follow that the law has allowed a recovery upon an implied promise which is totally opposed to the intention of the parties; for such contracts do not import that if, after a *bona fide* effort at performance, something is left undone, nothing shall be paid for what has been done. This is not what the rule means. It means that no recovery can be had upon an implied *assumpsit* which is entirely opposed to the understanding of the parties. It means that, where the parties have made one contract for themselves, the law can not make a totally different contract for them, and one which would lead to results totally opposed to those which they contemplated. This is well illustrated by a class of cases where persons occupy towards each other, by consent, the relation of parent and child. A father is not liable at law to support his adult son or daughter, nor entitled to his or her services. The same may be said of a step-father in respect of his step-child; of an uncle in respect of his nephew or niece, and so on; and yet, if the latter come to live with the former, and live in his family for years as a child lives with its parents, rendering services, and receiving in return shelter, clothing and subsistence, without any distinct contract as to wages, the latter can

[13] Hayward v. Leonard, 7 Pick 181; s. c. 19 Am. Dec. 268; Smith v. First Congregational Meeting House, 8 Pick. 178; Jewell v. Schroeppel, 4 Cow. 564; Hayden v. Madison, 7 Me. 78; Lee v. Ashbrook, 14 Mo. 378; s. c. 55 Am. Dec. 110; Marsh v. Richards, 29 Mo. 105; Lowe v. Sinclair, 27 Mo. 310; Lamb v. Brolaski, 38 Mo. 53; Creamer v. Bates, 49 Mo. 525; Yeates v. Ballentine, 56 Mo. 530; Cullen v. Sears, 112 Mass. 299, 308; Walker v. Orange, 14 Gray. 193; Cordell v. Bridge, 9 Allen. 355; Powell v. Howard, 109 Mass. 192; Moulton v. McOwen, 103 Mass. 587; Bragg v. Town of Bradford. 33 Vt. 35; Dyer v. Jones, 8 Vt. 205; Brackett v. Morse, 23 Vt. 354; Morrison v. Cummings, 26 Vt. 486; Hubbard v. Belden, 27 Vt. 645; Barker v. Troy, etc., R. Co., Id. 780; Swift v. Harriman, 30 Vt. 607; Kettle v. Harvey, 21 Vt. 301; Corwin v. Wallace, 17 Ia. 378; Tait v. Sherman, 10 Ia. 60; Phelps v. Sheldon, 13 Pick. 50; s. c. 23 Am. Dec. 659; Norris v. School District No. 1, 12 Me. 293; s. c. 28 Am. Dec. 182; Merrill v. Ithaca, etc., R. Co., 16 Wend, 586; Shipton v. Casson, 5 Barn. & Cres. 378; Sinclair v. Bowles, 9 Barn. & Cres. 92. Mr. Freeman, the learned editor of the American Decisions, has contributed a valuable note on the subject of these contracts (19 Am. Dec. 272, 282) in which he concludes that "this doctrine seems to be recognized, or to be growing in favor. Where, under a special contract, a party has in good faith bestowed some labor or parted with some articles to the benefit of another, who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking, or of causes which he might, with ordinary diligence, have provided against, the one receiving such benefit must pay therefor."

[14] Sickles v. Pattison, 14 Wend. 257; s. c. 28 Am. Dec. 527; Pettee v. Tenn. Manufacturing Co., 1 Sneed, 386; Crouch v. Miller, 5 Humph. 586; Stump v. Estill, Peck, (Tenn.) 175; Irwin v. Bell, 1 Tenn. 485.

[15] Britton v. Turner, 6 N. H. 481; s. c. 26 Am. Dec. 713. Compare Marshall v. Jones, 11 Me. 54.

[16] Porter v. Woods, 3 Humph. 56; s. c. 39 Am. Dec. 153; Eldridge v. Rowe, 2 Gilm. 91; s. c. 43 Am. Dec. 41; Britton v. Turner, 6 N. H. 481; s. c. 26 Am. Dec. 713; McClay v. Hedge, 18 Ia. 66. Compare Larkin v. Buck, 11 Ohio St. 568.

[17] Smith v. Brady, 17 N. Y. 173; (Compare Gaucius v. Black, 50 N. Y. 145; Sinclair v. Talmadge, 35 Barb. 602; Phillip v. Gallant 62 N. Y. 264;) Erwin v. Ingram, 4 Zab. 519; Haslack v. Mayers, 2 Dutch. 284; School Trustees v. Bennett, 3 Dutch. 513; Brown v. Fitch, 33 N. J. L. 418.

not thereafter recover wages of the former, or of his executor or administrator, although the value of the services rendered may have been greater than the value of the shelter, clothing and subsistence received; and the reason is that, for the law to raise such a promise would be to raise a promise directly opposed to the obvious understanding of the parties.[18] So where a slave voluntarily continues in his master's service after being entitled to his freedom, and renders services and is supplied with necessaries, without an understanding that he is to receive wages, he can not recover them on an implied assumpsit,[19] though it is otherwise where he is held involuntarily.[20] So, it has been held that if an apprentice continue in the service of his master under voidable indentures, he cannot thereafter recover wages contrary to the covenants of the indentures.[21] But this is very doubtful; for an "understanding" with an infant, is not the same as an understanding with a person who is *sui juris*. It is the privilege of infancy to avoid contracts not clearly for the infant's benefit; and, accordingly, the better opinion seems to be that the infant may, in such a case, disaffirm the contract of apprenticeship, abandon the service, and sue for the reasonable value of his services.[22]

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[18] Robinson v. Cushman, 2 Den. 149; Guild v. Guild, 15 Pick; 129. Fitch v. Peckham, 16 Vt. 150; Andrews v. Foster, 17 Vt. 556; Williams v. Hutchinson. 3 N. Y. 312. Contrary to this principle, it has been held in Massachusetts that a man who supports his wife's child by a former husband may maintain an action against such child, upon an implied assumpsit for necessaries furnished the latter. Freto v. Brown, 4 Mass. 675, per Parsons, C. J.; Worcester v. Marchant, 14 Pick. 510. But this is denied in Missouri. Gillett v. Camp, 27 Mo. 541. And see Cooper v. Martin, 4 East. 76. Gay v. Ballon, 4 Wend. 403. Under special circumstances, a widowed mother has been allowed to maintain a like action against her daughter for support during her minority. Worcester v. Marchant, 14 Pick. 510.

[19] Griffin v. Potter, 14 Wend. 209; Livingston v. Ackeston, 5 Cow. 531; Urie v. Johnston, 3 Pa. (Penr. & W.) 212; Alfred v. Fitzjames, 3 East. 3.

[20] Peter v. Steel, 3 Yeates, 250.

[21] Maltby v. Harwood, 12 Barb. 473; Harney v. Owen, 4 Blackf. 337. See, in support of this principle, Weeks v. Leighton, 5 N. H. 343; McCoy v. Huffman, 8 Cow. 84. (Overruled in Medbury v. Watrous, 7 Hill, 110.)

[22] Vent v. Osgood, 19 Pick. 572; Moses v. Stevens, 2 Pick. 332. See also Corpe v. Overton, 10 Bing. 252 (Overruling, it seems, Holmes v. Blogg, 8 Taunt. 608; S. C. 2 J. B. Moore, 552; dictum of Lord Mansfield in Drury v. Drury, 2 Eden, 39; S. C. Wilmot's opinions, 226, note a.); Olney v. Myers, 3 Ill. 311. The nature of implied promises is curiously illustrated by the rule that while an infant can, with certain exceptions, avoid his express contract, he cannot avoid his implied promise; which shows that an implied promise is no contract at all. Thus, an infant's tort can be waived and assumpsit maintained against him under the same circumstances as in case of an adult. Elwell v. Martin, 32 Vt. 217; Shaw v. Coffin, 58 Me. 254; Walker v. Davis, 1 Gray. 506.

LIABILITY OF HOLDERS OF NOMINALLY PAID-UP STOCK.

The capital stock of a business corporation is a fund upon which persons dealing with the company are entitled to rely. It may of course be diminished and even entirely lost in the transaction of the corporate business, but it can not be given away by the directors or other managing officers, nor can it lawfully be wilfully diminished by such officers or the stockholders whom they represent.[1] So much of it as is not lost in business, remains a trust fund for the benefit of creditors. This fund is all which at common law creditors have to depend upon. Stockholders are released from any liability beyond the full value of their stock, and it would be strange indeed if they were permitted to diminish even that small liability. Nevertheless they have frequently attempted to do so. The idea of being a stockholder as to profits, but not as to losses, has proved a very fascinating one to a certain class of minds, and several schemes have been devised to enable men to occupy that pleasant and lucrative position. A favorite one has been to organize a corporation in such a way as to obtain control of the directors, and have them purchase property from the organizers, for the company, at two or three times its real value, and pay the real value in cash and the balance in paid up stock, or the whole price in such stock. But such arrangements however ingenious have not been permitted to effect their end.

It is true indeed, that the directors of a corporation may receive in payment for

[1] Upton v. Tribilcock, 91 U. S. 45; Insurance Co. v. Floyd, 74 Mo. 286; Gill v. Balls, 72 Mo. 424; Skrainka v. Allen, 76 Mo. 384; Currier v. Lebanon Slate Co. 56 N. H. 262; Slee v. Bloom, 19 Johns. 456; Railroad Co. v. Vason, 57 Ga. 314; Railroad Co. v. Bowser, 48 Pa. St. 29; Wood v. Dummer, 3 Mason, 311.

stock any property which they may lawfully purchase and so long as the transaction is not impeached for fraud the courts will treat as payment that which the parties have agreed shallbe so treated;[2] and this is so even where the price honestly agreed upon exceeds the actual value of the property.[3] But where there is a deliberate and advised overvaluation of property so received, it is a fraud upon the law, upon other stockholders, and upon creditors and the transaction can not be permitted to stand. In such cases the party to whom the stock is issued is liable for the difference between the real value of the property and the par value of the stock.[4] No proof of any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value, is necessary in order to hold the stockholder liable. The fraud is consummated by issuing as full paid stock, stock which has not been fully paid for.[5] And where property was purchased by a corporation from one of its trustees for twice its real value, and the whole amount of the capital stock of the company was issued in payment, and it appeared that the property was of such a nature that its real value was easily ascertainable and was in fact known to the grantor, it was held that the transaction was fraudulent in law on its face.[6]

Where property has no actual, positive and ascertainable value it seems that it can not lawfully be accepted in payment of stock.[7] Where paid up stock is issued for services to be performed,[8] or in payment of indebtedness not yet due,[9] the person receiving it becomes liable for its par value. But paid up stock may be lawfully issued in payment of indebtedness due and payable in cash,[10] though not for more, calculating the stock at its par value, than the amount of the debt.[11] Even where the market value of stock issued in payment of a debt does not exceed the amount of the indebedness, it can not be considered fully paid up as against creditors unless the market value is equal to its par value.[12] He to whom shares of stock in a corporation are issued must in short, pay for them in money or money's worth. If nominally paid up stock is issued without consideration, either as a bribe or a present, the person who receives it becomes liable to creditors for its par value.[13]

The same principle applies where a stockholder who has only paid part of the par value of his stock receives a certificate that his stock is fully paid up.[14]

LIABILITY OF BONA FIDE HOLDERS FOR VALUE AND WITHOUT NOTICE.

In delivering the opinion of the court in Brinkinshaw v. Nicholls[15] Lord Chancellor Cairns said, "It would paralyze the whole of the dealings with shares in public companies if, a share being dealt with in the ordinary course of business, dealt with in the market with the representation upon it by the company that the whole amount of the share was paid, the person who took it was to be obliged to disregard the assertion of the company, and before he could obtain a title must go and satisfy himself that the assertion was true, and that the money had been actually paid; even if such a person were minded to make the investigation, he would be absolutely without the means of making it—it would be impossible for him to obtain accurate information as to whether this state of things were true or not." And he concluded that in such cases no inquiry is necessary, and that the defendant who had purchased nominally paid up shares of stock in ignorance of

[2] Brant v. Ehlen, 59 Md. 1; R. Co. v. Lighthall, 6 Rob. (N. Y.) 407.

[3] Phelan v. Hazard, 5 Dill. C. Ct. 45; Colt v. N. C. Gold Amalgamation Co., 14 Fed. Rep. 12; Peck v. Coalfield Coal Co., 11 Brad. (Ill.) 88; Schenck v. Andrews, 57 N. Y. 133; Carr v. LeFevre, 27 Pa. St. 413.

[4] Boynton v. Hatch, 47 N. Y. 225; Douglass v. Ireland, 73 N. Y. 100; Tallmadge v. Iron Co., 4 Barb. 382; Cabot & West, Springfield Bridge v. Chapin, 6 Cush. 50.

[5] Douglass v. Ireland, 73 N. Y. 100.

[6] Boynton v. Andrews, 63 N. Y. 93.

[7] Tasker v. Wallace, 6 Daly, 364.

[8] Barnes v. Brown, 11 Hun. (N. Y.) 315; Andrews Case, L. R. 8 Ch. Div. (Eng) 126.

[9] Appleyards Case, 49 L. J. Ch. (Eng.) 290.

[10] Van Cott v. Van Brunt, 82 N. Y. 535; Spargo's Case, L. R. 8 Ch. 412.

[11] Kehlor v. Lademann, 11 Mo. App. 550.

[12] Chouteau v. Dean, 7 Mo. App. 210; Jackson v. Traer, 20 N. W. Rep. 764, overruling Louisiana County National Bank v. Traer, 17 Cent. L. J. (Ia.) 152; S. C. 16 N. W. Rep. 120.

[13] Everman v. Krieckhaus, 7 Mo. App. 455; *Ex parte* Daniel, 1 DeG. & J. (Eng.) 372; Crawford v. Rohrer, 59 Md. 599.

[14] Insurance Co. v. Manufacturing Co., 97 Ill. 537; Scovill v. Thayer, 105 U. S. 143; Pickering v. Templeton, 2 Mo. App. 424; A. Wight Co. v. Steinkemeyer, 6 Mo. App. 574.

[15] L. R. 3 App. Cas. (Eng.) 1017.

the fact that they were not in fact paid up, could not be placed on the list of contributories. In that case, however, as in Waterhouse v. Jamieson,[16] in which the ruling was the same, the books appear to have agreed with the certificate.

In three American cases[17] the English doctrine has been adopted. but in New York it seems that the holder of stock which is not in fact paid up is liable to creditors of the corporation for the unpaid balance, whether a purchaser for value and without notice or not.[18] Where he has been made the victim of fraud he has his recourse against his vendor.[19] Where it is claimed that the holder of nominally paid up stock purchased in the course of business, took it with notice that it was not paid up, the burden of proving notice is upon the plaintiff.[20]

St. Louis, Mo. B. F. Rex.

[16] L. R. 2 Scotch & Div. Apps. 29; see also McCraken v. McIntyre, 1 Duv. (Canada) 479.

[17] Steacy v. R. Co., 5 Dill. (C. Ct. U. S.) 348; Brant v. Ehlen, 59 Md. 1; Sanger v. Upton, 91 U. S. 56, 60.

[18] Boynton v. Andrews, 63 N. Y. 93; but see Holbrook v. N. J. Zinc Co., 57 N. Y. 616.

[19] Tasker v. Wallace, 6 Daly (N. Y.) 364.

[20] Burkinshaw v. Nichols, 3 L. R. App. Cas. 1017.

WHEN CREDITOR MAY PROCEED AGAINST ESTATE OF DECEASED PARTNER.

1. *The Modern Rule.*—Prior to the case of Devaynes v. Noble,[1] the English court of chancery had uniformly held that a partnership creditor could not proceed against the estate of a deceased partner, without either exhausting his remedy against the survivors or at least showing that such survivors were insolvent. This decision was a departure from the former adjudications, but it had been constantly adhered to, and the rule it enunciates is the law of Great Britain to-day. It establishes the broad doctrine that in every case a partnership creditor may resort to the estate of a deceased partner without first proceeding against the survivors irrespective of the question whether such survivors are insolvent or not. The court placed its decision on the ground that in equity partnership debts are several as well as joint, and that therefore any one of the members of a firm is in the event of his death liable as though the debt were an individual debt. The principle on which this decision was based has been uniformly invoked in support of this doctrine by the different courts which have adopted this doctrine. Although it does not universally obtain, it has the sanction of a decided preponderance of authority and is supported by nearly all the text-books. It is declared to be the law in the United States Courts by the United States Supreme Court,[2] and has been incorporated into the jurisprudence of most of the States.[3]

2. *Views of the Text Writers*—The text books appear to be unanimous in support of this rule.[4] Story[5] says: "The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner except when the surviving partners were at the time of his death, or subsequently became insolvent or bankrupt. But that doctrine has been since overturned, and it is now held that in equity all partnership debts are to be deemed joint and several, and conse-

[1] 1 Mer. 529, 188.

[2] Nelson v. Hill, 5 How, 127.

[3] In New Hampshire by Bowker v. Smith, 48 N. H. 111. In Vermont by Washburn v. Bank of Bellows Falls, 19 Vt. 278. In Connecticut by Camp v. Grant, 12 Conn. 41. In New Jersey by Wisham v. Lippincott, 1 Stockt. Eq. 353. In Alabama by Travis v. Tartt, 8 Ala. 577. In Arkansas by McLain v. Carson, 4 Ark. 164. In Tennessee by Saunders v. Wilder, 2 Head. 579. In Florida by Filegan v. Laverty, 3 Fla. 72. In Texas by Gant v. Reed, 24 Tex. 46. In Indiana by Meyer v. Thornburgh, 15 Ind, 124; Dean v. Phillips, 17 Ind. 406; Hardy v. Overman, 36 Ind. 549; In Mississippi by Freeman v. Stewart, 41 Miss. 141; Irby v. Graham, 4 Miss. 428. In Illinois by Mason v. Tiffany, 45 Ill. 392; Silverman v. Chase, 90 Ill. 37; Doggett v. Dill, to appear in 108 Ill., but not yet reported. This last case also decides another very important question intimately connected with this subject. It holds that a failure to proceed against the survivors till they become insolvent will not exonerate the estate of the deceased partner from liability although the debt could have been collected from the survivors before their insolvency. The following English authorities support the doctrine laid down in Devaynes v. Noble. (*supra*) Wilkinson v. Henderson, 1 Myl. & Keen. 582; Braithwaite v. Britain, 1 Keen 206; Bronsow v. Douglas, 10 Law Journal 14. In Lewis v. United States, 82 U. S. 622, the Supreme Court cited with approval the former decision in that court (Nelson v. Hill, supra) in which the doctrine of Devaynes v. Noble is recognized and followed.

[4] Story, Parsons, Kent, Lindley, Collyer, Dixon and other eminent law writers sanction it with their unqualified endorsement."

[5] In his work on Partnership, sec. 362.

quently the joint creditors have in all cases the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner whether the survivor be insolvent or bankrupt or not."[6] Mr. Lindley says: "Whatever doubt there may formerly have been upon the subject, it was clearly settled before the judicature acts, that a creditor of the firm could proceed against the estate of the deceased partner without first having recourse to the surviving partners and without reference to the state of the accounts between them and the deceased.[7] In Dixon on Partnership[8] we find the doctrine recognized and approved in these words: "When a liability exists the creditor may at his option either pursue his legal remedy against the survivors or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves or to the ability of the survivors to pay." And Collyer is even more explicit and clear in his statement of the true rule. "It is now established beyond controversy that in the consideration of courts of equity a partnership debt is several as well as joint, and that upon the death of a partner, a joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate without reference to the question whether the joint estate be solvent or insolvent, or to the state of accounts amongst the partners."[9]

3. *Minority View.*—This doctrine, as has been already intimated, does not obtain in every jurisdiction. The courts of several of the States have repudiated it and adheres to the rule as it was established by the English courts prior to the case of Devaynes v. Noble.[10] These all hold that the creditor before pursuing the estate of the deceased partner must either exhaust his remedy against the survivors, or show that they are insolvent. None of them appear to hold that it is absolutely necessary for a creditor to exhaust his legal remedy against the survivors as a condition precedent to his right to proceed against the decedent's estate. It is sufficient if they are insolvent.[11] Where the creditor has caused an execution to be issued upon his judgment and it has been returned unsatisfied, he has exhausted his legal remedy, and may at once proceed against the estate of a deceased partner, even though it be made to appear conclusively that the defendants in the execution had property which might have been seized by the execution, and still own such property.[12]

(4). *Joinder of Surviving Partners.*—The case of Wilkinson v. Henderson[13] enunciates

[6] In his work on Equity Jurisprudence he states the doctrine in substantially the same way; sec. 676.

[7] Lindley on Part. 1053.

[8] At page 113.

[9] Collyer on Part. sec. 580. See also 3 Kent. Com. 63 and 64 and note.

[10] *Supra.* These States are New York, Georgia, Wisconsin, Pennsylvania, Ohio, and probably North and South Carolina. Caldwell v. Stileman, 1 Rawle 212; Bennett v. Woolford, 15 Ga. 213; Daniel v. Townsend, 21 Ga. 155; Sherman v. Kreul, 42 Wis. 33; Reinsdyke v. Kane, 1 Gall. 385; Pendleton v. Phelps, 4 Day. 481; Hubble v. Perrin, 3 Ham. (Ohio) 287; Jenkins v. DeGroot, 1 Caines Case, in Error 122; Hammersley v. Lambert, 1 John Ch. 508; Trustees v. Lawrence, 11 Paige 80; s. c. 2 Denio 577; Voorhis v. Childs, 17 N. Y. 354; Richter v. Poppenhausen, 43 N. Y. 74; Hoyt v. Bonnett, 50 N. Y. 538; Pope v. Cole, 55 N. Y. 124.

[11] This was expressly held in Riper v. Poppenhausen, (*supra.*) In this case the court say: "It is also urged that the suit can not be maintained against these executors until the plaintiff has first exhausted his remedy at law against the surviving member of the firm, or unless he has been discharged as a bankrupt or insolvent. * * * But we have been referred to no case or principle that requires the remedy at law to be first exhausted the surviving partner before resort can be had to the estate of the deceased partner. If it can be shown that the surviving member of the firm is without means by any common law proof we see no objection to that kind of evidence."

[12] Pope v. Cole, 55 N. Y. 124. The Court in this case say: "It is now said by the counsel for the appellant that the plaintiff ought to be precluded from this equitable remedy for the reason that the survivor had the property, from which, had the sheriff discovered it the execution might have been satisfied. But the plaintiffs were not in fault for the failure of the sheriff to discover this property. They had done all that was required of them when they had delivered the execution to the sheriff. It was not their but the duty of the sheriff to ascertain whether the debtor had property to satisfy it, and when the sheriff returned that he had not, the legal remedy was exhausted, and the plaintiffs were at liberty to pursue their equitable remedy against the estate of the deceased." The leading case in which the now generally exploded doctrine that a creditor cannot proceed against deceased partner's estate until he has exhausted his remedy against the survivors is laid down in Gray v. Chiswell, 9 Ves. 118. In addition to the States already referred to it would seem that Iowa and Kentucky have adopted this doctrine, and that in those States the creditor as a condition precedent to his right to pursue the estate of the deceased partner must show an execution against the surviving members or at least establish their insolvency. Lewis v. Conrad, 11 Iowa; Pearson v. Keedy, 6 B. Monr. 128.

[13] 1 M. & K. 582.

a rule which does not appear to have been adopted in this country. It decides that in the suit in equity against theestate of the deceased partner, which according to this case can be instituted in the first instance, the survivors are interested and that they must therefore be made parties defendant although no money judgment can be rendered against them. In this case Hartley, the surviving partner, who was made a party defendant to the equity suit against the deceased partner's estate, contended that as no decree could be rendered against him he ought not to have been made a party to the suit. In reply to this objection Sir John Leach said: "The remedy against Hartley, the surviving partner is altogether at law; and I can make no decree against him; but he was properly joined as a defendant to the suit, being interested to contest the demand of the plaintiff and of all other persons claiming to be joint creditors."

(5). *Liability at Law.*—The English authorities do not sanction the broad doctrine that the estate of the deceased partner is liable in the first instance, both at law and in equity. A suit at law must be brought against the last survivor, or in case of his death against his personal representatives. A joinder of the personal representatives of the partners who first died would be improper in such an action.[14] This is the settled rule in this country also.[15]

GUY C. H. CORLISS.

Poughkeepsie, N. Y.

[14] Richards v. Heather, 1 B. & Ald. 29; Calder v. Rutherford, 3 Brod. & Bing. 302.

[15] Barney v. Smith, 4 Har. & J. (Md.) 485; Murray v. Manford, 6 Cow. 441; Clarke v. Howe, 23 Me. 460; Peters v. Davis, 7 Mass. 257; Belton v. Fisher, 44 Ill. 33; Joyslin v. Taylor, 24 N. H. 268.

RIPARIAN RIGHTS--DIVERSION OF WATER COURSE — PARTIES IN DIFFERENT STATES.

MAUREL I CO. v. WORCESTER.

Supreme Judicial Court of Massachusetts. November, 1884.

1. The diversion of the waters of a natural stream in one State, and preventing the same from coming to plaintiff's mill in another State, is a tort for which an action may be maintained in the former.

2. In such an action, so far as the water is returned, there is no wrong to plaintiff; but if there were, the return would go in mitigation of damages.

This was an action of tort to recover damages for the diversion of the waters of Tatnuck brook to the injury of the plaintiff. It appeared in evidence at the trial before Judge Barker and a jury that the plaintiff's mill is situated on Blackstone river in the State of Rhode Island, and that in 1876, the defendant pumped water from Tatnuck brook into a reservoir for a water-supply and thereby diminished the flow of water at the plaintiff's mill. The defendant asked the court to instruct the jury that, inasmuch as the plaintiff is not shown to have any interest in any reservoir or in the waters situated within this State, the diversion of the waters of a natural stream in this State and preventing the same coming to the plaintiff's mill situated in Rhode Island, is not an act for which the plaintiff can maintain an action in this Commonwealth. The court refused so to rule. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. S. B. Hopkins, for plaintiff; *Frank P. Goulding*, for defendant.

HOLMES, J., delivered the opinion of the court:

This was an action of tort. It appeared at the trial that the plaintiff was the owner of a mill in Rhode Island upon the Blackstone river, and there was evidence that the defendant had withdrawn enough of the waters of Tatnuck brook, a tributary of that river in Massachusetts, to materially affect the operation of the plaintiff's mill. The main question argued before us is raised by the refusal of a ruling requested that "the diversion of the waters of a natural stream in this State, and preventing the same from coming to the plaintiff's mill situated in Rhode Island, is not a tort for which the plaintiff can recover in the courts of the Commonwealth."

The defendant's counsel contend, in the first place, that such rights as the plaintiff claims can not extend beyond the Rhode Island line and went the length of maintaining that servitude can not be created in our State in favor of lands in another.

We are unable to agree to this proposition from either principle or authority. Every decision and dictum that we have found bearing on the precise point is the other way. Slack v. Walcott, 3 Mason, 508, 516; Thayer v. Brooks, 17 Ohio, 489; Stillman v. White Rock Mfg. Co., 3 Wood & M. 538; Foot v. Edwards, 3 Blatchford, 310; 14 Howard, 80; Wallace, Jr., 274.

We think that the cases which recognize civil and even criminal liability for flowing land in one State by reason of a dam in another, are hardly less pertinent. Howard v. Ingersoll, 17 Ala. 780; 39 Me. 246; 47 Ill. 534; 54 Texas, 623; 16 N. H. 357.

The defendant admits these cases to be law, and tries to distinguish them. But we can not assent to the distinction between discharging and with-

holding water. The consequence in one case is positive, in the other negative; but in each it is the consequence of an act done outside of the jurisdiction where harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership, in the latter easement; but the laws of Rhode Island which make a man owner of land there, have no more power to diminish freedom of action in Massachusetts than any other of its laws. A concurrence of the laws of both States is as necessary in that case as in the one at bar to create a liability which could be enforced in either State consistent with principle. Such a concurrence presents no technical difficulties, and if the substantive end to be attained is a proper one, it will be recognized and acted on here as, we have no doubt, that it would be in Rhode Island, if the position of the parties were reversed. Of course, the laws of Rhode Island can not subject Massachusetts lands to servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creating of such servitude. So it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an easement as incident to his ownership of land in that State than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here. Slack v. Walcott, 3 Mason, 508, 516. So far as their creation is concerned, the law of Massachusetts governs whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as materially arising out of the relation between the two estates; being created by the laws of Rhode Island, by permission of that of that of Massachusetts, lays hold of them and attaches to them in such way as it is applicable to lands there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two States, and by the power over its own territory, which it holds in reserve.

It was also contended for the defendant that the action could only be brought in Rhode Island. This objection is purely technical. The reasons which once made the venue important have long disappeared, and we see no reason for any greater strictness than is absolutely required by the statutes and precedents. If the plaintiff's mill was in any other country of this State, an action for damages would be rightly brought in Worcester, not only by Public Statutes, chap. 161, sec. 8; but by the common law; Barder v. Crocker, 10 Pick. 283; Abbot Stratford's Case, G. B., 7 Hen. IV, 8 pl. 10: Bulwar's Case, 7 Co. 1*a*, 2*b*; Leveridge v. Hoskins, 11 Mod. 257. As between two States, both of which recognize the right, if the rule is to vary at all, it should be on the side of greater liberality to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained. The weight of judicial opinion is altogether in favor of allowing an action to be maintained where the water was withdrawn; Foot v. Edwards, *supra*; Stillman v. White Rock Mfg. Co., *supra*; Thayer v. Brooks, *supra*; 1 Wall. Jr. 274; 14 How. 80.

The decisions in cases where both the act and the consequences complained of were outside the State in which the action was brought, are not opposed to our conclusion, and we are not called upon to decide between Lord Mansfield in Mostyn v. Fabrizas, Cowper, 161, Sm. L. C., and Lord Kenyon in Donleson v. Matthews, 4 T. R. 503. The American cases have generally followed the latter.

The plaintiff asked the court to rule that the defendant was liable for damages measured by the loss of power which the whole amount of water pumped by the defendants would have made, although the defendant had introduced evidence that a certain percentage of it was returned to the river. This ruling was refused, and rightly. So far as the water returned, its withdrawal was no wrong to the plaintiff, and even if it had been, the return would go in mitigation of damages upon the same principle as in trover.

Judgment on the verdict.

HUSBAND AND WIFE — CONTRACT BETWEEN — COMPENSATION — ATTACHMENT.

KINGMAN v. FRANK.

Supreme Court of New York, October 6, 1884.

Where a married woman, having a separate estate or business, employs her husband to manage the same, and agrees to pay him a stated compensation for his services, a chose in action in his favor against her is created, which, on her failure to pay, can be reached by a judgment creditor of the husband.

Appeal from a judgment entered upon an order sustaining a demurrer to a complaint.

DANIELS, J., delivered the opinion of the court:

This suit was brought by the plaintiff as a judgment creditor of the defendant Gustave Frank, after the issuing and return of an execution unsatisfied against his property. The only property which it was alleged he had that was applicable to the payment of the judgment, was a debt of $1,040, owing to him from his wife. This debt was alleged to have arisen for services performed by him in her employment, under an agreement by which she agreed to employ him to manage and superintend a separate business carried on by her as a dealer in dry goods and notions, for which she agreed to pay him eight dollars a week. It is further alleged that he entered upon the performance of the agreement, and continued under

it in her service until the alleged indebtedness had accrued in his favor.

The demurrer was served upon the alleged ground that these facts did not constitute a cause of action, and it was sustained by the court for the reason that the husband himself could not enforce the payment of his salary by an action against his wife. That she could employ him as she did to perform services for her in her separate business, resulted from the statutory provision empowering her to carry it on the same as though she was an unmarried woman, and the existence of that power of employment derived from this statutory authority has already received the sanction of the courts (Fairbanks v. Mothersell, 60 Barb. 406; Abbey v. Dyo, 44 N. Y. (?) 343; Foster v. Perech, 68 N. Y. 400).

As she could enter into a lawful contract for the employment of her husband in this manner, and has been required by the statute to be considered as a *femme sole* in the exercise of the authority conferred upon her, it would seem to follow that she could obligate and bind herself for the payment of the stipulated compensation. From the facts made to appear the sum of money alleged in the complaint, has been earned by him and become payable from her for the performance of his services under a lawful agreement entered into by her, and it is to be presumed in support of the plaintiff's action that she would be willing to pay over the amount voluntarily to him in satisfaction of his demand against her husband, as soon as the legal right to receive payment shall be acquired in these proceedings from her husband. Certainly the court has no ground to assume, and for that reason to defeat the action, that she would not honestly and fairly perform her contract by payment of the money as soon as the plaintiff shall be placed in a position where he would have a legal right to receive it.

But it will not follow from the inability of the husband to collect the debt by means of legal proceedings, that the plaintiff would be prevented from doing so by reason of the same disability, if it should be considered to exist. For this disability would extend no further than to affect the remedy, and would not stand in the way of the plaintiff to recover the debt, or of a receiver appointed for that purpose under a proper judgment of this court. To warrant such a recovery all that would seem to be necessary is an obligation on the part of the wife to pay the money, and that obligation has been created by her contract and the performance of her husband's services under it. These facts, together with the acquisition of the demand by the plaintiff, or by a receiver in the action, would be all that could be legally required to maintain an action for the recovery of the debt. In this respect the case would resemble that of a foreign executor or administrator, who, while he could not maintain an action in this State to recover a demand due to the testator or intestate might still assign it to another person, who could upon the title so acquired successfully prosecute such an action. And that an assignee might in like manner recover this demand would seem to follow from the principle of Fitch v. Rathbone (61 N. Y., 576). For if the assignee of the wife may maintain an action against her husband for th conversion of her property, it would seem to follow that the assignee of the husband might also maintain an action against the wife to recover the amount of an indebtedness she had lawfully incurred to her husband.

The case of Perkins v. Perkins (2 Barb. 561), when its circumstances are considered, will not appear to be an authority sustaining the conclusion arrived at by the Special Term. The other authorities, as well as the result of the statute to which reference has been made, appear to be sufficient to enable the plaintiff to maintain this action and to obtain satisfactionof his demand out of the legal obligation created against the wife in favor of ker husband.

The judgment should be reversed, with costs, and judgment should be directed for the plaintiff on the demurrer, with leave to the defendants to withdraw the demurrer and answer in twenty days, on payment of the costs of the demurrer and of this appeal.

DAVIS, P. J,, and BRADY, J,, concur.

GIFTS INTER VIVOS — TRUST — BANK DEPOSITS.

POPE v. CUSHING.

Supreme Court of Vermont.

A direction by a bank depositor to the bank treasurer to pay the account to himself during life and after his death to B, such direction being made after the deposit does not operate as a gift, or declaration of trust in favor of B.

Assumpsit brought in the City Court of Burlington by the executor of Sidney Barlow's will against the defendant, in which action Marion Cushing was cited to appear as claimant under sec. 3578, R. L. Judgment for the plaintiff.

By the custom of the bank, to prevent frauds in case of loss of deposit book, no name of a depositor appeared on their deposit book, but merely a number. On a register, kept in the bank, these numbers were inscribed and against each number were separate columns for the names, residence occupation, age and date of birth of the depositor, together with such remarks or conditions as to the deposit as were directed to be entered.

The column headed, "signature," neither in this case nor in other cases contained the signature of any person, but merely a name written by the officers of the bank, which was that of the person in whose name the deposit was directed to be made.

This book was issued and this entry so made in

accordance with the express direction of Mr. Barlow.

Mr. Barlow made or executed no writing in respect to this deposit at any time or on said book, or the books of the bank; nor was there any evidence that he made any entry anywhere in respect to this deposit, except that some time before his death, it did not appear when he wrote the initials M. C. in pencil upon the cover of the deposit book as they now appear; and these initials indicate the name of Marion Cushing.

The other facts are sufficiently stated in the opinion of the court.

VEAZEY, J., delivered the opinion of the court.

I. The deposit by Barlow in the name of Marion Cushing, the claimaint, can not be sustained as a gift *inter vivos*. It was his money, and, although deposited in her name, it was made payable solely to himself during his life, he retaining the pass book and having absolute control of the deposit, and she being neither a party to, nor having any knowledge of the transaction. Where there are no conditions to a gift an acceptance may be implied; but a delivery is an indispensable requisite in order to constitute a completed gift; and as a general rule it must be such a delivery as terminates the donor's possession and dominion and control of the article. "A declaration of an intention to give is not a gift." "The donor must be divested of, and the donee invested with the right of property." Appleton, Ch. J., in Northrop v. Hale, 73 Me. 66, "To constitute a donation *inter vivos* there must be a gift, absolute and irrevocable, without any reference to its taking effect at some future period. The donor must deliver the property, and part with all present and future dominion over it." Shepley, Ch. J., in Dole v. Lincoln, 31 Me. 428; Taylor v. Henry, 48 Md. 550; 2 Kent. Com. 438.

In this State and some others this rule has not been rigidly adhered to in one class of cases, viz.: Where there is a donation of money or evidence of indebtedness, like notes or bonds, and the gift is perfect in all other respects, it is not defeated after the decease of the donor by a right reserved to recall a part or the whole of the gift during his life. Such a reservation is regarded as optional and personal to the donor, and the right expires with his life, and, if not exercised, then by his death the gift is freed from the condition of defeasance, and the right of the donor becomes absolute. It is not strictly a modification of the general rule; because it is, in essence, a gift in trust, absolute and complete in respect to delivery, but providing, as in all cases of trust, what the trustee shall do with the money. The provision that a part or the whole shall be subject to the use and call of the donor during his life, does not defeat the gift as to the part which remains at his decease. The donor by the transfer and actual delivery divests himself of the possession and title, subject only to be brought back into his estate by recall. This is the doctrine of Blanchard v. Sheldon, 43 Vt. 512; and Barlow v. Loomis *et al*, lately decided in the U. S. Circuit Court of this district. See, also, Davis v. Ney, 125 Mass. 590. Whether under the authority of these cases the transaction would have constituted a perfected gift *inter vivos*, if Barlow had delivered the deposit book to this claimant, or some other person in trust, is not the question in the case at bar. Here there was no delivery whatever. If the deposit had been made in such a way and with such an understanding with the bank as to place it beyond recall or control of Barlow, then the transaction might, under the authority of Howard v. Savings Bank, 40 Vt. 597, be upheld as a complete gift, notwithstanding Barlow kept the deposit book. But the bill of exceptions in this case fails to bring it within the theory upon which that case was decided.

II. Can this transaction be sustained as a trust, the bank being the trustee? This depends, first, on the relation between a depositor in a savings bank and the bank. Is it a trust relation or a debt and credit relation? In a certain class of cases involving the question whether a savings bank could be taxed on its securities; and others, where the bank had become insolvent, and its business was being closed up by a receiver, and questions arose between the rights of depositors and creditors, courts have said, that as the design of the legislature in granting the charter was to promote industry and frugality, and preserve the fruits of honest toil by enabling persons to invest in a safe and profitable manner, and contemplated no benefit to the managers, but looked only to the security and advantage of the depositors, a trust of a general or public character was created. Stockton v. Mechanics' etc. Bank, 32 N. J. Eq. 163, is an illustrative case of this kind. Savings banks are not unfrequently called trustees in this class of cases; but I find no case where it is held that the relation of the bank to the depositor is a pure trust relation; but on the other hand it was lately decided in People v. Savings Institution, 92 N. Y. 7, that the primary relation of a depositor in a savings bank, to the corporation, is that of creditor and not that of a beneficiary of a trust; that the deposit when made becomes the property of the corporation; that the depositor is a creditor for the amount of the deposit, which the corporation becomes liable to pay according to the terms of the contract under which it was made, that there is nothing like a private trust between the corporation or its trustees and the depositors, in respect to the deposits. In Ide v. Pierce, 134 Mass. 260, it was held that money, deposited in a savings bank, unless there is an agreement to the contrary, becomes the property of the bank, and the bank becomes a debtor therefor. We think this is the correct view. All the deposits are intermingled. The bank handles and invests them in its own name and as its own funds. No deposit could be traced. The recovery of a deposit by a depositor would be by suit at law, as in this case, not by bill in chancery to enforce a trust. It is not apparent what advantage could accrue to

depositors from a trust relation. The managers are accountable to them to their administration as trustees, the same as the managers or directors of a stock company are accountable to the stockholders. The statute, sec. 3575 R. L., provides an easy method of making a deposit a trust for another, which was in force when the deposit in question was made. If a deposit in the depositor's name does not create a trust relation, no more would that relation be created by depositing in another person's name, or making it payable to another's order. The claimant, therefore, can not stand on the ground that the bank became a trustee when the deposit was made, without any declaration of trust.

III. But it is further insisted in behalf of this claimant, that the transaction created a trust between her and Barlow; that is, that the latter held the bank pass-book as trustee for the claimant.

The general doctrine is now settled that a perfect and completed trust is valid and enforceable, as between the trustee and beneficiary, although purely voluntary. It is not essential that the beneficiary should have had notice. But a voluntary trust which is still executory, incomplete, imperfect, or promissory, will neither be enforced nor aided. A perfect or completed trust is created where the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds the property in trust for purposes named. He need not in express terms declare himself trustee; but he must do something equivalent to it, and use expressions which have that meaning. If the intention is to make such a transfer as would constitute a gift, but the transaction is imperfect for this purpose, the court will not hold the intended transfer to operate as a declaration of trust; "for then every imperfect instrument would be made effectual by being converted into a perfect trust." The act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention; and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. "An imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust." In order to render a voluntary settlement valid and effectual, as a trust it must appear from written or oral declaration, from the nature of the transaction, the relation of the parties and the purpose of the gift, that the fiduciary relation is completely established. These propositions are established in numerous cases. See Hilroy v. Lord, 4 De G. F. & J. 264; Richards v. Delbridge, L. R., 18 Eq. 11; Hartley v. Nicholson, L. R., 19 Eq. 233; Young v. Young, 80 N. Y. 422; (citing many cases.) Martin v. Frank, 75 N. Y. 134; Webb's Est., 49 Cal. 541; Stone v. Hackett, 12 Gray, 227; 2 Pom. Eq. s. 996, *et seq.*; Urann v. Coates, 109 Mass. 581; Gerrish v. Bank, 128 Mass. 159; Clark v. Clark, 108 Mass. 522; Ray v. Simmons, 11 R. I. 266; Minor v. Rogers, 40 Conn. 512.

In the light of these settled rules, and of what Barlow did, the question is whether what he said constituted a declaration of trust. As stated by Lord Cranworth in Jones v. Lock, L. R., 1 Ch. App. 25: "The cases all turn upon the question whether what has been said was a declaration of tru t, or an imperfect gift."

On the 15th day of January, 1880, Sidney Barlow deposited in the defendant bank $800, of his own money, and took therefor deposit book No. 10,973, issued by the bank, which he always kept and controlled. No name of a depositor appeared on any deposit book, but merely a number. He directed the treasurer to enter the name, Marion Cushing, this claimant, on the bank register as the person in whose name the deposit made, and to enter, "Payable to S. Barlow"; and this was done.

In March and June following Barlow borrowed sums of money from this bank, giving his individual notes therefor, and pledging this pass-book as security; and when the notes became due he withdrew from this deposit to apply in payment of the notes a sum which left the balance less than $400. On August 20, 1880, Mr. Barlow, being in ordinary health, verbally directed the treasurer to add to the said entry, "Payable to S. Barlow," so as to make it read as follows: "Payable to S. Barlow during his life, and after his death to Marion Cushing," which was done. It does not appear that anything else was ever said or written by Mr. Barlow to any one in respect to this deposit, or his intentions in regard to it. A by-law printed in said pass-book provided that no deposit could be withdrawn without the production of this book. The treasurer understood this deposit was under Barlow's control, and regarded and treated him as the depositor, and that it was his money; and the bank had no communication with Miss Cushing, or any one else in respect to it. Nothing else occurred in regard to it previous to his death. He left a will, made before this deposit, in which was this provision: "I hereby confirm all gifts I have made or shall make to any of my children." Marion Cushing was a grandchild, living in California.

The money deposited was Barlow's. The pass-book was the evidence of the deposit, and took the place of the money in his hands. No species of property could be more easily transferred or delivered. Nothing was said indicating an intention to hold the book in trust other than the direction to make said entry on the bank register.

In Taylor v. Henry, 48 Md. 550, one H deposited in a bank a sum of money belonging to himself, to the credit of himself and his sister M., so that the account was entered, "H. M. and the survivor of them, subject to the order of either, received $1850." A short time after, H drew out $50, and died in about a month, leaving the $1800 on deposit. Held, that since H retained the power and

dominion over the money, there was not a complete gift, and the transaction did not constitute a valid declaration of trust in M's favor.

Other leading cases to the same import are Mitchell v. Smith, 4 De G. M. & G. 422; Scales v. Maude, 6 De G. M. & G. 43; Jones v. Lock, L. R. 1 Ch. App. 25; Heartley v. Nicholson, L. R. 19 Eq. 233; Young v. Young, 80 N. Y. 422.

In Martin v. Funk, *supra*, cited by counsel for this claimant, the depositor declared at the time that she wanted the account to be in trust for the plaintiff (who was so claiming it), and it was so entered.

In Barker v. Frye, 75 Me. 29, the depositor informed the treasurer of the bank that she desired to make a deposit for each of four grandchildren, naming B as one of them, to which she proposed to make additions, etc., and saying, "she wanted to do something for the children;" and took passbooks in their names, though subject to the order of the depositor during her lifetime.

In these cases it was held that the deposit created a valid trust, the depositors holding the passbooks as trustees, but they differ from the case at bar. In the New York case there was a plain declaration of trust; in the Maine case the declaration, though not of a trust in terms, strongly imports the intent to create one. Two English cases, not cited by the claimant, but tending to support her claim of a trust, viz.: Richardson v. Richardson, L. R. 3 Eq. 686, and Morgan v. Mallerson, L. R. 10 Eq. 475, have been repeatedly criticised in this country and England, and are regarded as contrary to the doctrine settled by the weight of authority, and virtually overruled.

There is in other cases an apparent lack of harmony in some respects; notably as to the importance of notice to the beneficiary, and as to the effect of the donor's retaining the custody, control and use of the fund; but this will be found to exist more in suggestions in opinions than in decisions rendered.

Our conclusion in this case is, upon what we think is the weight of authority and the soundest view, that the transaction did not create a trust between the claimant and Barlow.

Those views render it unnecessary to pass upon the admissibility of the evidence objected to. Treating that as properly in the case, the result arrived at is strengthened.

Judgment affirmed.

CORPORATION—PURCHASE OF CAPITAL STOCK — REPLEVIN FOR CORPORATE PROPERTY.

BUTTON v. HOFFMAN.

Supreme Court of Wisconsin, September 23, 1884.

One who, by purchase or otherwise, becomes the owner of all the capital stock of a private corporation, does not thereby become the legal owner of its property, and can not maintain replevin therefor in his own name.

Appeal from circuit court, Jackson county.

Carl C. Pope, for respondent; *C. F. Ainsworth* and *S. U. Pinney*, for appellant.

ORTON, J., delivered the opinion of the court:

This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In his instructions to the jury the learned judge of the circuit court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title?" We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural person who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged into the corporate identity. Ang. & A. Corp. secs. 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Id. sec. 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trust*. Gray v. Portland bank, 3 Mass. 365; Eidman v.

Bowman, 4 Amer. Corp. Cas. 350.

The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp. sec. 191; Pope v. Brandon, 2 Stew. (Ala.) 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby th stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3 Mees. & W. 422; Waltham Bank v. Waltham, 10 Metc. 334; Tippets v. Walker, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation can not divert it from such use, and a shareholder has no right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp. secs. 160, 190, 557; Hyatt v. Allen, 4 Amer. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp. sec. 779 a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property, and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. One stockholder owning the whole capital stock, could, of course, do what several stockholders could lawfully do. It is said in city of Utica v. Churchill, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in Hyatt v. Allen, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In Railroad Co. v. Railroad Co. 23 Minn. 329, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In Baldwin v. Canfield, 26 Minn. 43, S. C. 1 N. W. Rep. 261, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In Bartlett v. Brickett, 14 Allen, (Mass.) 62, an action of replevin was brought by A., B., and C., as the "trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., trustees as aforesaid," became, and the officer, in his return, certified that he had taken a bond "from the within-named A., B. and C.," and the property was receipted by "A., B., and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in Van Allen v. Assessors, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In Wilde v. Jenkins, *supra*, where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In Mickles v. Bank, 11 Paige, 118, it was held that, although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In Bennett v. American Art Union, 5 Sandf. Super. Ct. 613, it was held that, "as a general rule, the whole title, legal and equitable, (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of complainant, as a shareholder in the art-union, for an injunction against a certain disposition of its property, was denied, because it had no interest in it. See, also, Goodwin v. Hardy, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of the property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. Timp v. Dockham, 32 Wis. 146; Sensenbrenner v. Matthews, 48 Wis. 250; s. c. 3 N. W. Rep. 599. In analogy to the above principle it was held in Murphy v. Hanrahan, 50 Wis. 485, s. c. 7 N. W. Rep. 436, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would

entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WEEKLY DIGEST OF RECENT CASES.

1. APPEAL—ACQUIESCENCE.

After judgment and expiration of delay for suspensive appeal, the party cast preserves the right to a devolutive appeal within one year, but all power to prevent the execution of the judgment is lost. Sale under such execution passes valid title. The party may therefore take such steps as the law authorizes to prevent the sacrifice of his property without thereby acquiescing in the judgment or forfeiting his right to appeal. His acting in the appointment of appraisers, attending and bidding at sale, and like conservatory acts, do not constitute acquiescence in the judgment, barring appeal. *Factors & Traders Co. v. New Harbor Co.*, S. C. La., Dec. 1st, 1884.

2. ARREST—VOLUNTARY ESCAPE IS NO DISCHARGE FROM IMPRISONMENT.

The ancient rule that a debtor in execution by a voluntary escape became discharged both from imprisonment and the debt, leaving the creditor to look to the sheriff alone for his debt, is no longer in force, and upon such escape he may be again lawfully re-arrested and imprisoned. *People v. Hanchett*, S. C. Ill. Sept. 27, 1884; Reporter's Head Notes.

3. ASSAULT AND BATTERY—DAMAGES—REPUTED WEALTH OF DEFENDANT.

In an action for assault and battery where punitory damages are recoverable, the financial condition of the defendant may be shown by evidence of his reputed wealth. *Draper v. Baker*, S. C. Wis., Nov. 25, 1884.

4. CAPIAS AD SATISFCIENDUM—DUTY OF SHERIFF TO KEEP DEBTOR AFTER RETURN OF WRIT.

Where the sheriff arrests one under a *ca. sa.*, it is his duty to retain the custody of the defendant until the judgment is satisfied, or the defendant is otherwise legally discharged, without reference to what becomes of the writ, or even whether it remains in force, or has expired by lapse of time. It is not necessary to renew the writ to make the continued imprisonment legal. *People v. Hanchett*, S. C. Ill., Sept. 27, 1884; Reporter's Head Notes.

5. CITIES—STREETS AND ALLEYS—EJECTMENT.

A city can not maintain ejectment to recover a public alley or street. Its interest therein is a mere easement, and it is not entitled to the possession of the premises within the meaning of the statute. *City of Racine v. Crotsenberg*, S. C. Wis. Nov. 25, 1884.

6. COMMON CARRIERS—PAYMENT OF ANTECEDENT CHARGES.

It is not the duty of common carriers to pay antecedent charges on freight tendered to them by connecting carriers, even where it is customary to do so. *Baltimore & Ohio R. Co. v. Adams Ex. Co.*, U. S. C. C. E. D. Mo., Oct. 21, 1884; 22 Fed. Rep. 32.

7. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS OF OTHER STATES.

Our law granting the right of attachment against a non-resident debtor is not in conflict with section 2, article 4 of the Constitution of the United States, or the fourteenth amendment to said constitution. *Pyrosulite Co. v. Ward*, S. C. Ga. Dec. 2, 1884.

8. CONTRACT—WHAT AMOUNTS TO.

1. An abandonment of a contract need not be the result of any express proposition to terminate its operation. If the jury is satisfied from a number of facts, the conduct of the parties with reference to the transaction that by mutual assent, the contract was treated as at an end, they are justified in treating it as such. 2. Whether acts and conduct amount to such an abandonment is a matter of fact. A court can pass upon the question only when unequivocal, clear facts are presented for construction. 3. If a furnace company agrees to let A run its furnace—for one year from the time of lighting it at a stipulated compensation, and preparations are begun for lighting it at one time but before completion, the work is stopped by mutual consent on account of the unfavorableness of the market, with no understanding as to resumption of the work, it can not be held as a matter of law, that an abandonment of the contract was contemplated. *Chouteau v. Jupiter Iron Works*, S. C. Mo. Nov. 24, 1884.

9. CRIMINAL LAW—INDICTMENT UNDER DRAM-SHOP ACT.

Where a number of persons assembled at a house for the purpose of dancing, and plaintiff in error was induced to go to a neighboring town and procure a jug of whiskey, and it was understood that he should contribute thirty cents of the price paid for the liquor, and the others the residue, some contributing before, others after its procurement: *Held*, that an indictment will not lie against plaintiff in error for selling intoxicating liquors in less quantity than one gallon, without having a legal license to keep a dram shop. *Hogg*

v. People, Ill. App. Ct. Oct. 10, 1884; 17 Chic. L. N. 100.

10. DAMAGES—NUISANCE—DIMINUTION OF RENTAL VALUE—LOSS AFTER ACTION.
Every continuance of a nuisance is a new nuisance and in an action at law only such damages are recoverable as occurred before the commencement of the action. Thus where the plaintiff alleges special injury to property used for renting, from noise and bad odors, lessening its rental value, he can not besides having the nuisance abated recover as for a permanent diminution of such rental value, but only for his loss prior to the commencement of the action. *Stadler v. Grieben*, S. C. Wis., Nov. 25, 1884.

11. EQUITY—SETTING ASIDE CONVEYANCE—TENDER OF MONEY PAID.
Where in an action to set aside a conveyance on the ground of fraud the plaintiff offers in the complaint to return the money paid therefor, it can not be objected on demurrer that the plaintiff did not before bringing the action, tender back such money. The court can protect the rights of all parties, and the failure to make such tender can effect only the question of costs. *Koples v. Orth*, S. C. Wis, Nov. 25, 1884.

12. ESTOPPEL BY CONTRACT—CORPORATE CAPACITY—PLEADING.
A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived. *Oreg. R. Co. v. Oreg. R. & N. Co.*, U. S. C. C. D. Oreg. Dec. 1, 1884; Daily Oreg. Dec. 2, 1884.

13. EVIDENCE — FEDERAL COURTS — PRIVILEGED COMMUNICATIONS.
The provision in the New York Civil Code that "a a person duly sworn to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that State, in trials at common law. *Conn. Mut. L. Ins. Co.*, U. S. S. C., Nov. 17, 1884.

14. EVIDENCE—HEARSAY—REPUTATION FOR SKILL.
Evidence of the reputation of a party as a skillful workman is not admissible to show the value of his services. *Cohen v. Stein*, S. C. Wis., Nov. 25, 1884.

15. EVIDENCE — PRESUMPTION — SELF-PRESERVATION.
It is not proper to instruct the jury that they should presume that a party did that which was necessary to self preservation, except in the total absence of proof on the subject. *Phila. etc. R. Co.* Md. Ct. App. Nov. 1884; 13 Md. L. Rec. 111.

16. EVIDENCE—USAGE—NEGLIGENCE.
The question being whether the bell was rung and the whistle blown as a locomotive approached a highway crossing, evidence that those things were not done at a similar crossing three miles distant was admissible. *Bower v. C. M & St. P. R. Co.*, S. C. Wis., Nov. 25, 1884.

17. GUARDIAN AND WARD—SETTLEMENT WITH, AFTER AGE—WHEN MAY BE OPENED.
A settlement pressed upon wards about the time of their becoming of age, by one standing *in loco parentis*, and claiming to represent their mother and lawful guardian, from which the latter is forcibly excluded, should not be sustained, except in so far as it is just and fair to them. If based chiefly on improper charges against them, they should not be concluded by it. *Lehman v. Rothbarth*, S. C. Ill., Sept. 27, 1884; Reporter's Head Notes.

18. INSURANCE—FIRE—POLICY—EXAMINATION OF INSURED UNDER OATH.
A stipulation in a policy of insurance that "the assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto, when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claim under the policy," is valid. *Gross v. St. Paul, etc. Co.*, U. S. C. C. D. Minn. Oct. 24, 1884; 22 Fed. Rep. 74.

19. LANDLORD AND TENANT—EJECTMENT—BREACH OF COVENANT—WAIVER.
Where a lease contains a covenant that the lease shall be forfeited if the tenant sublets the premises, and the landlord knowing that the tenant has sublet signs the lease, *held*, that the signing indicated an intention on the part of the landlord to waive his right of forfeiture. *Carson v. Wood*, S. C. Vict., Oct. 1, 1884; 6 Aust. L. T. (N. C.) 92.

20. LARCENY—INFORMATION—ALLEGATION OF OWNERSHIP.
An information for larceny which alleges that "the property taken was the personal property in the possession of Frederick Schwartz, and that the same was taken from the person and against the will of him, the said Schwartz," sufficiently describes the ownership of the property. *People v. Hicks*, S. C. Cal. Nov. 18, 1884; 4 W. C. Rep. 420.

21. LIBEL—PRIVILEGE.
Statements made by witnesses in an affidavit before a court of competent jurisdiction, in a criminal proceeding, to support a motion for a new trial, based on the averment of newly discovered evidence, are privileged if applicable, pertinent and material to the subject before the court, and do not expose the witnesses to an action in damages where the same prove false and malicious. *Burke v. Ryan*, S. C. La., Dec. 1, 1884.

22. LIMITATION OF ACTION—ABSENCE OF DEFENDANT FROM STATE.
Sec. 4231, R. S. (providing that if when the cause of action shall accrue against any person, he shall be out of this State the action may be commenced within the term limited, after such person shall return to or remove to this State) applies to the temporary absence of a resident of the state, although during such absence a summons might be served by leaving it at his usual place of abode. *Parker v. Kelly*, S. C. Wis., Nov. 25, 1884.

23. JURISDICTION OF STATE COURTS—MANDAMUS—MORTGAGE.
The fact that the United States Court has taken cognizance of the liquidation of an association whose mortgages have pre-empted or been paid, will not prevent the State court from ordering the erasure of such mortgages upon sufficient proof administered contradictorily with all parties inter-

ested. *Lanaux v. Recorder*, S. C. La. Dec. 1, 1884.

24. MASTER AND SERVANT — INJURY TO SERVANT — NEGLIGENCE OF FELLOW-SERVANT—MASTER AND MATE OF VESSEL.

The owners of a vessel are not liable for an injury to the mate resulting from the negligence of the master, the latter being a fellow-servant of the mate engaged in a common employment. *Mathews v. Case*, S. C. Wis., Nov. 25, 1884.

25. MASTER AND SERVANT—LIABILITY FOR WILFUL TORTS—EMPLOYMENT.

A master is not liable for the wilful and tortious acts of his servant, even though done when about the business for which he was employed. *Adams v. Cost*, Md. Ct. App. 18 Rep. 686.

26. MORTGAGE — ASSUMPTION BY PURCHASER — DEBTOR — SURETY.

When a purchaser of land subject to a mortgage is by the terms of the deed to assume and pay the mortgage debt, he becomes in his relation to the mortgage debtor the principal debtor, and the original debtor in relation a surety; but this relation exists only between themselves, and does not affect the mortgage creditor. When, after a mortgage note has become due, time is given the purchaser, who has assumed the debt, for payment, it does not discharge the original debtor on the ground of suretyship. *Boardman v. Larrabee*, S. C. Conn. 18 Rep. 681.

27. MORTGAGE—BREACH OF COVENANTS—NON-PAYMENT OF INTEREST WITH PROMPTNESS—ATTORNEY'S FEES—INSURANCE.

1. When a mortgagor is imprisoned upon an unjust charge of crime, and as soon as released, after acquittal, he with due diligence, makes payment of an instalment of interest overdue, and pays up back taxes, which there had been no attempt to enforce, in equity, he is saved from the stringent letter of his covenant that in the event of prompt payment of such interest and taxes, the whole principal of the debt should become due. 2. A deduction from a loan by the broker effecting a loan to a mortgagor, of enough to obtain good insurance upon the mortgaged property, and his promise to obtain it, and his neglect to do so, while the mortgagor always supposed the property insured, will not justify a forfeiture for breach of the usual condition as to insurance, of the right to have payment of the principal postponed. 3. The stipulation in a mortgage that the mortgagee may retain $50 as attorney's fees out of the proceeds of sale, contemplates a sale, and, if foreclosure is stopped by tender according to equity, the mortgagee can not demand the fee. *Phillips v Bailey*, S. C. Mo. Nov. 24, 1884.

28. NEGLIGENCE — VIOLATION OF ORDINANCE — PRIMA FACIE CASE.

The fact that a train was running at a greater rate of speed than allowed by the corporation through whose limits it was passing, even if established, would not of itself be conclusive proof of such negligence as would entitle the plaintiff to recover. *Philadelphia, etc. R. Co. v. Stebbing*, Md. Ct. App. Nov., 1884; 13 Md. L. Rec. 111.

29. NEW TRIAL—RIGHT TO OPEN AND CLOSE—REVERSAL OF JUDGMENT.

A judgment will not be reversed because the appellant was erroneously deprived of his right to open and close, unless it appears that he was prejudiced thereby. *Parker v. Kelly*, S. C. Wis., Nov. 25, 1884.

30. PARTNERSHIP—POWER TO CONSENT TO ALTERATION.

Where a note given for a threshing-machine jointly owned by H and L, was executed in the individual names of H and L, and H and L are in partnership in the operation of the machine, dividing the profits and losses equally, and while such relation exists the payee in the note is altered by substituting the name of O for the original payee, and the alteration is made with the knowledge and consent of H, but without the knowledge or consent of L, *held*, as H and L are not in a trading or commercial partnership, H had no authority to make the material alteration in the note so as to bind L, and such material alteration, being made without the consent of L, releases him from all liability upon it. *Horn v. Newton City Bk.* S. C. Kan., Nov. 7, 1884; 4 Pac. Rep. 1022.

31. PLEADING—PLEA IN BAR OR ABATEMENT.

In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered, unless expressly pleaded in abatement. *Oreg. R. Co. v. Oreg. R. & N. Co.*, U. S. C. C. D. Oreg., Dec. 1, 1884; Daily Oreg., Dec. 2, 1884.

32. PRACTICE—INJURIES TO PERSON—EXAMINATION BY PHYSICIAN AT TRIAL.

In an action for personal injuries the court may, in a proper case, at the trial direct the plaintiff to submit to a personal examination by physicians on behalf of the defendant. *White v. Milwaukee, etc. R. Co.*, S. C. Wis. Nov. 25, 1884.

33. RAILROAD—NEGLIGENCE—CAR DOOR FALLING—PRESUMPTION.

An injury was suffered by reason of a car door falling upon a person. *Held*: Mere proof of the accident and its circumstances does not raise a presumption of negligence, but the plaintiff must show that the defect causing the accident was known to defendant, or had existed for such a length of time that knowledge would be presumed. *Case v. C. R. I. & P. R. Co.*, S. C. Iowa, 18 Rep. 685.

34. RAILROAD—OBSTRUCTION OF SURFACE WATER.

As a general rule the obstruction of the flow of mere surface water from land by the construction of a railroad does not constitute a cause of action in favor of the land owner. *Hanlin v. C. & N. W. R. Co.*, S. C. Wis., Nov. 25, 1884.

35. RAILROADS—STOP-OVER TICKETS—NEGLIGENCE OF CONDUCTOR—DAMAGES.

A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or leave the train, may elect to leave train, and in that case may recover from the railroad company not merely the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as the direct and natural consequence of the fault of the first conductor. *Yorton v. M., L. S. & W. R. Co.* S. C. Wis. Nov. 25, 1884.

36. SCHOOL-DISTRICT—ACTION BY PRIVATE PARTY.
A private person can not, by virtue of being a citizen and tax-payer, maintain an action against a school-district or its officers, where the act complained of affects merely the interests of the public in general, and not those of such private person in particular. *Nixon v. School-District*, S. C. Kan., Nov. 7, 1884; 4 Pac. Rep. 1017.

37. TAXATION—CONTRACTS—CONSTITUTIONAL LAW—MANDAMUS.
Relator's judgment being founded on a contract entered into in 1873, at a time when the city of New Orleans possessed a power of taxation for general expenses, exclusive of interest and schools, of twelve and one-half mills, so far as necessary to the satisfaction of the contract the same power of taxation continues to exist irrespective of subsequent legislation or constitutional restrictions, and the exercise of this power may be compelled by mandamus. *State v. New Orleans*, S. C. La. Dec. 1, 1884.

38. TORT—PRIVITY—CONTRACTUAL DUTY.
Where a fi. fa. was pledged as collateral security, and the pledgee received payment while the execution was in his hands and subsequently returned it to the plaintiffs in fi. fa. without entering thereon the payment, and the fi. fa. was transferred by the plaintiffs in fi. fa. and the collection of the execution in the hands of the transferree was defeated by the defendant in fi. fa. setting up the payment mentioned, such transferree could not maintain an action for damages against said pledgee for breach of duty in failing to make such entry for want of privity between such pledgee and transferree. *Granade v. Hardaway*, S. C. Ga., Dec. 2, 1884.

39. TRADE-MARK—USE OF SURNAME—PARTIES OF SAME NAME—DECEPTION AND FRAUD—INJUNCTION.
While a party can not be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person. *Landreth v. Landreth*, U. S. C. C. E. D. Wis., 22 Fed. Rep. 41.

40. WILL—BEQUEST TO "MY WIFE"—FORMER WIFE LIVING—PROBATE.
Testator separated from his wife, and went through the ceremony of marriage with another woman, with whom he lived for many years as his wife. By his will he made her his residuary legatee as "my wife." The first wife was still alive. *Held*, that the second wife was the person intended, and grant of probate made to her as residuary legatee. *Howe's Goods*, Eng. H. Ct. Prob. Div., 48 J. P., 743.

41 WILL—"CHARITABLE CORPORATION.
A religious corporation, such as the trustees of a church, is not a charitable corporation within the meaning of sec. 2039, R. S. *De Wolf v. Lawson*, S. C. Wis., Nov. 25, 1884.

QUERIES AND ANSWERS.

QUERIES.

59. A. owes B. a debt. C. colludes with A. to smuggle and conceal A.'s property, whereby B. is prevented from collecting his debt out of A. Is C. liable for the debt as a result of his collusion with A.? Cite authorities. H. R. S.
Pulaski, Tenn.

60. Is a *Nolle Prosequi*, by the States Attorney, a sufficient legal termination of a criminal cause to maintain an action for malicious prosecution. And especially so when made in words as follows: "And comes now the States Attorney and represents to the court that he has no evidence to prosecute this cause and with the permission of the court this cause is *nolle prosequi*." Give full citations, *pro* and *con*.

61. In February 1877, A., with other creditors of B. filed a petition in involuntary bankruptcy against B. before an adjudication B. filed a petition for composition at 75 per cent. under the provision of the Bankrupt Act and a resolution of acceptance thereof in ordinary form being signed by a sufficient number of creditors—A. being one of the signers—was duly confirmed by the court and carried into effect by the giving and subsequent payment of the composition notes by B. Six months after the composition and before the payment of the last composition note, B. gave to A. his promissory note for the remaining 25 per cent. of his former indebtedness, but now resists payment thereof on the ground that there was no consideration therefor.
The law being settled, in the State where the note was given and suit is pending, that there can be no recovery on notes given for balance of debt voluntarily compromised but may be where the debt for which the note is given was discharged by Bankruptcy or Insolvent laws, can there be a recovery on the note in question? Is the signing of a composition under the Bankrupt Act of 1867, such a "voluntary compromise" or such a discharge in Bankruptcy, as will or will not leave a consideration for the new note? Give reasons or authorities or both. COMPROMISE.

62. A., who is married, buys necessaries for his wife and family from B., for which, some time afterwards he gives his note to B. B. sues and obtains a judgment before a J. P. against A. and does not join the wife, but alleges and proves and it is adjudged by the J. P. that the note was given for necessaries furnished as stated. Can the judgment be made out of A.'s wife's personal property under Sec. 3295 and 3296, Chap. 51 R. S. Mo.? If yes, then can the constable require plaintiff to give bond after receiving notice from A.'s wife that the property belongs to her? M.

63. A. being the head of a family, composed of a wife and one child, purchases a tract of 640 acres of land paying one third of the purchase price in cash and securing the remainder thereof by a mortgage on said land. After three months occupancy of said farm, as his homestead, A. dies and the estate is administered on, and an order made for the sale thereof to pay A.'s debts, and the purchase price thereof, and at the sale B. purchases said land which is still occupied by A.'s widow, B. paying for said land in full, and then marries A.'s widow and they occupy the same as their homestead, for three months, then

they separate and B. makes a deed to said land to C. and then B.'s wife, still occupying said farm as her homestead, sues B. for divorce, on the ground of "offering indignities and cruel treatment" and B.'s wife in her petition for divorce asks to have homestead set out as the widow of "A.," has she any homestead in said land either as the widow of A. or B. and what would be the proper action for C. to bring against A.'s wife who is still in possession of such land to recover the same? Cite authority.

S.

RECENT LEGAL LITERATURE.

BOONE ON MORTGAGES.—The law of mortgages of real and personal property, including also the law of pawn or pledge and collateral securities as determined by the courts of England and the United States. By Charles T. Boone, LL. B. Author of the "Law of Corporations," "Real Property," etc. San Francisco. Sumner, Whitney & Co., 1884.

The aim of this work is to present a complete but condensed view of the law relating to the subjects mentioned within the compass of a handy volume uniform with the works now embraced in the Practitioners Series. The author is now familiar to the profession through his former contributions to this series. The praise which his efforts have received, the support that has been given to his works on Real Property and Corporations are sufficient testimonials to his competency as a writer, and a satisfactory assurance of the quality of the work.

RAPALJE ON CONTEMPTS. A treatise in Contempt, including civil and criminal contempts of Judicial Tribunals of the Peace, Legislative Bodies, Municipal Boards, Committees, Notaries, Commissioners, Referees, and other officers exercising judicial and *quasi*-judicial functions, with practice and forms. By Stewart Rapalje, Author of the Federal Reference Digest, etc., etc. New York. L. K. Strouse, Law Publishers, 95 Nassau St. 1884.

The author very properly says that no apology is necessary for offering this treatise to the profession, it being the first upon the subject, and there being over two thousand cases upon it cited by the learned author. The treatise is divided into four parts, the first relating to jurisdiction which very properly includes in its three chapters, General Principles, the Limits of the Power, and the subject matter of the power; the second relating to "what is punishable as matter of contempt," chapter first covering the law in general, chapter second embracing all contempts committed while acting in an official capacity, chapter third treating of disobedience of process, judgment orders and decrees, and chapter fourth of violations of injunctions. Disobedience of mandamus is discussed in chapter fifth, and contempt by publication receives the attention devoted to chapter sixth. The various contempts that may be committed by witnesses are considered in the succeeding six chapters which include "Privileges as to self crimination," and "Privileged Communications," Part III covering proceedure, treats of preliminary proceedings to bring a party into contempt, the application for process, the initial process, its form and sufficiency, the return, and proceedings prior to, or incidental to the hearing, the hearing and proceedings therein, conviction and punishment and herein, of contemnors, disability, costs, etc. Part IV points out the remedies open to the contemnor which are of course the applications for relief to court of first instance, appeal or writ of error, certiorari, Habeas Corpus, and other collateral remedies. It has been a long time since we have seen a book with a better arrangement. The text is clear and concise, and the index is good. We fail to see the case of Frew recently decided by the Supreme Court of Appeals of West Virginia and we suppose the treatise was prepared before that case was decided.

NOTES.

——A Nevada judge, who had been a great scamp years before his accession to the bench, recognized an old acquaintance in a prisoner brought before him, and supposing himself safe from recognition, asked the prisoner what had become of the companions of his early life of crime. The reply was, "They are all hanged, your honor, except you and me."

——Levi Woodbury, once a judge of the Supreme Court of the United States, was an indefatigable worker. So much so as to be in some respects a terror to the bar, for he always seemed to think that other people could work as many hours in the day as he could. He was an immensely large man and did not like to move about. When he got his seat on the bench in the morning, with a large tumbler of ice-water before him, he was ready for any number of hours' work. He would occasionally have relays of cases. That is, when the jury went to dinner, he would call up some case in equity where no jury was needed and proceed with that. George W. Cooley, of the Boston bar, was an able lawyer but fearfully long-winded, and in one case Judge Woodbury kept him at it for nearly the whole term. When there was nothing else doing, he would send for Mr. Cooley and set him going until the jury came back or until counsel in some other cases had returned from lunch. Some lawyers would have got restive at such treatment, but Cooley never yet objected to hearing himself argue if anybody would listen. The worst of it was with Judge Woodbury, however, that while cases were going on he would amuse himself by writing lyceum lectures or letters, or by drawing up opinions in other cases which had been held under advisement. He never lost any time, and when everybody was tired out and the court must in decency be adjourned, he would slowly and reluctantly retire, and sleep the sleep of a righteous judge, who meant business and a good deal of it. Richard Fletcher, one of the ablest of all the Boston lawyers, came from New Hampshire as Judge Woodbury did, and had a great prejudice against the Judge. Once, being annoyed at the dilatory proceedings, he whispered that the latter always seemed to "string out" matters as much as he could. "Yes," said some one, "but he is always patient." "Oh, yes, patient as a jackass."—*Ex.*